In the Matter of an Attorney[1]

June 17, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On May 20, 1992, Respondent Attorney and counsel for the Board entered into a settlement stipulation, subject to the Board's approval, providing for the entry of a consent order by the Board. The parties waived all further and other proceedings before the Board to which they may be entitled under the National Labor Relations Act and the Board's Rules and Regulations.

The settlement stipulation is approved and made a part of the record, and the proceeding is transferred to and continued before the Board in Washington, D.C., for the entry of an order pursuant to the provisions of the settlement stipulation.

In approving the settlement, we do not dispute our dissenting colleague's view that publication of a disciplined attorney's name may be important in deterring future misconduct. Neither do we preclude publishing a disciplined attorney's name in an appropriate future case. Under the unique circumstances here, however, including among other things that this is the first formal Board disciplinary proceeding against the Respondent, that the Board does not now have any rules concerning attorney misconduct at hearings that would place an attorney on notice concerning the extent of disciplinary action for inappropriate conduct, and that the alleged conduct occurred more than 2 years ago, the advantages of an immediate disciplinary consent order outweigh any additional deterrent effect that might be gained from publication of the attorney's name after a hearing. Further, contrary to our dissenting colleague, we believe that publication of this Decision and Order, even with the attorney's name redacted, will be sufficient to alert Board personnel and the labor bar that such conduct need not and will not be tolerated.

We also disagree with our dissenting colleague's view that the settlement's additional provision that the Board will not seek further disciplinary action against the Respondent by referral of the matter to the appropriate state bar(s) is inappropriate. While referral of a disciplinary matter to the state bar may be proper, we do not believe it is in every circumstance required. We note, for example, that this is not a case involving conduct that causes harm to third parties, such as misappropriation of client funds.

The Board's primary statutory interest and obligation is in protecting its administrative processes. In our view, the settlement accomplishes this purpose by suspending the Respondent, an attorney with a substantial NLRA practice, from appearing or practicing before the Agency for a significant period.

ORDER

Upon the basis of the settlement stipulation, and the entire record thereof, pursuant to Section 102.66(d)(2) of the Board's Rules and Regulations, the National Labor Relations Board orders that the Respondent shall be

(a) reprimanded for using profanity and verbally addressing the opposing counsel and witness in a rude, vulgar and/or profane manner during the course of the representation hearing in Case 32–RC–3207; and

(b) suspended, beginning the date of this Order, from appearing or otherwise practicing before the Agency for 1 year for this conduct; provided that 6 months of this 1-year suspension shall be stayed for a period of 3 years, such stay to be lifted and the remaining 6 months immediately imposed upon any further like or related misconduct by Respondent in any proceeding before the Agency.

MEMBER RAUDABAUGH, dissenting.

I would not approve the settlement. It is deficient in several respects.

First, it forbids the Board from referring this matter to appropriate state bars. Although the Board has an interest in regulating the conduct of attorneys who appear before it, the state bars have at least as great an interest in these matters. State bars are the traditional guardians against attorney misconduct. Their interest in these matters is deeply rooted. It is regrettable and inappropriate for the Board to be a party to an arrangement to keep the state bars in the dark as to the allegedly improper conduct involved herein.

Second, I would not redact the name of the Respondent from the publication of this Decision and Order. A purpose of publication is to apprise other attorneys that misconduct will not be tolerated and can result in sanctions. The hope is that these attorneys will thereby be deterred from engaging in misconduct. It is clear to me that publication of the name of the Respondent herein is essential to the goal of deterrence. By such publication, other attorneys would be made aware that misconduct will result in suspension and that names, misconduct, and penalty will be published nationally. That kind of publicity can affect not only an attorney's reputation and that of his or her law firm but also the ability to get referrals. With that in mind, attorneys and their firms are apt to be very careful with respect to their conduct. On the other hand, an anonymous suspension has a far lesser impact. Concededly, in that situation, the attorney cannot practice

[1] Pursuant to the provisions of the settlement stipulation, all references to the name of the Respondent and/or his law firm shall be redacted from any publication or other public disclosure by the Agency of this Order or other documents constituting the record herein.

before the Board for a period of time. However, if, like many practitioners, the attorney does not do a lot of Board work, this impact is minimal. More importantly, the anonymity of the suspension will leave intact the attorney's reputation and the capacity for referrals. Hence, in order to achieve the goal of deterrence, I would put attorneys on notice that, if they engage in misconduct, their names will not be kept secret.

Third, a further purpose of publication is to alert Board personnel of our commitment to ensuring appropriate conduct and taking action to correct abuse. By full publication of sanctions, we would send a clear message to our personnel that they need not suffer or tolerate inappropriate conduct. By contrast, a publication that sweeps the name of the offender under the rug sends the mixed signal that misconduct will be punished but not in a manner designed to put a stop to such behavior.

I recognize that, in a settlement, each party often gets less than it originally sought. However, I note that, in the instant case, the Board has already given up one-half of the actual suspension time that it sought. In addition, although there are always risks in litigation, I note that the alleged misconduct in this case was on the record and thus could not be factually disputed.

In support of their acceptance of the redaction of Respondent's name, my colleagues note that this is the first formal disciplinary proceeding against the Respondent.[1] However, if an attorney engages in ''aggravated'' misconduct, even for the first time, Section 102.66 provides for suspension or disbarment. The rule does not condition these penalties on a prior violation. Nor does the rule permit a free bite of the apple. The purpose of the rule is to prevent such misconduct from occurring at all, i.e., even for a first time. Since, as discussed above, publication of the Respondent's name is an important part of such deterrence, I would not permit redaction simply because the attorney did not previously engage in aggravated misconduct.

My colleagues also assert that the Board does not have any rules that would place an attorney on notice concerning the extent of disciplinary action. I disagree. Section 102.66 expressly and specifically provides for suspension or disbarment. In any event, the issue before us is not the extent of disciplinary action; the issue is whether a name will be redacted. Ordinarily, a published decision of the Board *will* contain the names of the parties. There is nothing in the rule that requires or even suggests that there be a departure from this normal procedure.

With respect to notification of the state bar, my colleagues speculate that the state bar may not be concerned about a case that does not involve harm to third parties or misappropriation of client funds. I would not speculate as to whether the state bar would or would not be concerned about the instant matter. The issue is whether the state bar officials should be *informed* so that they, and not we, can decide on the extent of their concern. I would inform them and let them make the appropriate judgment.

[1] Although Respondent has not previously been sanctioned by this Board, he has engaged in unprofessional conduct that incurred the wrath of a circuit court. Respondent was criticized for his failure to apprise the court of a material factual change that occurred while the case was being appealed and for his procrastination in obeying the court's orders.